

MASS. CA 22.2: IN1/995-8



Commonwealth of Massachusetts  
CABLE TELEVISION COMMISSION\*

GOVERNMENT DOCUMENTS  
COLLECTION

SEP 11 1998

In Re

Amendment of  
207 CMR 4.01 - 4.06

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Docket No.: R-24

Released: August 16, 1995

University of Massachusetts  
Depository Copy

Public Hearing: September 6, 1995  
Comment Date: September 18, 1995

**NOTICE OF PROPOSED RULEMAKING**

**I. INTRODUCTION**

The Commission proposes to amend or partially repeal its regulations concerning the transfer or assignment of a cable television license, 207 CMR 4.01 - 4.06. The Commission proposes these changes in part as a result of the enactment of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), the Commission's subsequent review of matters involving the transfer or assignment of existing licenses, and Commission case law. We seek input from all interested parties on the proposed changes to streamline the transfer process. The Commission particularly welcomes comments as to whether or not these measures would ease the administrative burdens on communities and cable companies.

**II. PROPOSED CHANGES**

**A. 207 CMR 4.01: Applicability**

Section 4.01 defines when the transfer regulations apply: "No license shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any entity holding such license to any person or entity, except after prior approval by the issuing authority, and as hereinafter provided."

Pursuant to M.G.L. ch. 166A, § 7, "[n]o license or control thereof shall be transferred or assigned without the prior written consent of the issuing authority, which consent shall not be arbitrarily or unreasonably withheld." The 1992 Cable Act also addresses the time frame

\* Formally, the "Massachusetts Community Antenna Television Commission" under M.G.L. ch. 166A, §2.



during which a franchising authority has to act on a request for consent to a transfer. Under 47 U.S.C. § 537(e):

a franchising authority shall . . . have 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority. If the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time.

Since Section 4.01 of the Commission's rules may be preempted by federal law and because this rule is primarily a repetition of the statute on which it is based, the Commission proposes it be repealed.

#### **B. 207 CMR 4.02: Exclusions**

Section 4.02 of the Commission's regulations outlines criteria used to determine which transactions will be excluded from the definition of a "transfer of control" for purposes of the Commission's regulations. In general, the Commission's experience has been that these regulations are difficult for the Commission, municipalities, and cable operators to apply. In some instances, for example, a literal reading of the regulations requires a transfer proceeding for a mere paper transaction involving no real change in control. To require the city or town and the cable operator to conduct a transfer proceeding in this scenario is an inefficient use of each participant's resources.

Section 4.02 states:

Transfer or assignment of control for the purpose of 207 CMR 4.00 shall not include transfers between commonly controlled corporations or between parent and subsidiary. Commonly controlled corporations means any group of:

(1) One or more chains of corporations connected through stock ownership with a common parent corporation if:

(a) Stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned by one or more of the other corporations; and

(b) The common parent corporation owns stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.





(2) Two or more corporations if stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of stock of each of the corporations is owned by one person who is an individual, estate, or trust.

On numerous occasions, the Commission has analyzed corporate changes to determine whether or not they constitute a transfer or assignment of an existing license. For example, when a parent company merged with a wholly owned subsidiary, the Commission determined that this was not an assignment or a transfer of control.<sup>1</sup> Furthermore, the Commission determined that the spinoff of a parent company to another entity is not a transfer when the license holder's subsidiaries remain under the parent company's control. However, the Commission did find that the cable operator should give the affected issuing authority and the Commission information on stock ownership, directors of the new entity and its financial strength.<sup>2</sup> In addition, the Commission has found that the consolidation of some of a company's licenses under a new entity, both of which are wholly owned subsidiaries of the parent company, is not a transfer. However, again the Commission suggested that the affected issuing authorities be notified.<sup>3</sup> Thus, as the previous instances suggest, our experience has been that the rules have not provided any clear guidance to the parties involved in a transfer, and the parties end up coming to the Commission for its opinion.

The landscape in the telecommunications and entertainment industries includes a myriad of mergers, acquisitions and joint ventures. The current regulatory structure, however, is too narrowly defined to be useful under such circumstances. Indeed, the Commission's role must be flexible to meet the current trends of the industry. Trying to craft and interpret transfer rules at a time when technologies, corporate structures and industries themselves are changing and converging, is simply unproductive. Enabling the Commission to independently address the issues and individual facts of each circumstance will accelerate the transfer review process and ease the administrative process for all affected parties. Thus, the Commission proposes to repeal 207 CMR 4.02. In the absence of 207 CMR 4.02, then, the Commission would rely on its precedents and would address and resolve any novel issues that may arise on a case by case basis.

### **C. 207 CMR 4.03: Control**

207 CMR 4.03 outlines criteria used to determine whether or not a transaction will be

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<sup>1</sup> 31 Cable Interpretations File ("CIF") 4; 42; 43. The Commission also determined that the transfer of ownership interests to a wholly owned subsidiary is not a transfer of control. 31 CIF 47.

<sup>2</sup> 31 CIF 25.

<sup>3</sup> 31 CIF 23.



considered a "transfer of control" for purposes of the Commission's regulations. These regulations, like those in section 4.02, are difficult for the Commission, municipalities, and cable operators to apply. The regulations in section 4.03 are at once both too broad and too narrow, restricting the Commission's ability to make an informed judgement on the particular facts of any given situation. In some instances, for example, their literal reading requires a transfer proceeding for a mere paper transaction involving no real change in control. To require the city or town and the cable operator to conduct a transfer proceeding in this scenario is an inefficient use of each participant's resources.

207 CMR 4.03(1) states:

- (1) Transfer or assignment of control, as used herein, includes but is not limited to:
  - (a) Any instance where an individual stockholder gains or loses affirmative or negative (50%) control. (Affirmative control consists of control of more than 50% of voting stock; negative control consists of control of exactly 50% of voting stock).
  - (b) Any instance where any family group or any individual in a family group gains or losses affirmative or negative (50%) control.
  - (c) Any instance where any group in privity gains or losses affirmative or negative (50%) control.
  - (d) Any instance where a general partner of a limited partnership, as defined in M.G.L. c. 109, § 1, is replaced, where a new general partner is admitted to the limited partnership, or where an existing general partner leaves the limited partnership, in a manner which effects a change of control of the new entity.
  - (e) Any instance where a partner of a partnership, as defined in M.G.L. c. 108A, § 6, is replaced, where a new partner is admitted to the partnership, or where an existing partner leaves the partnership, in a manner which effects a change of control of the new entity.

In matters involving stock transfers the Commission has frequently considered whether or not there has been a "transfer of control". The Commission has held that the acquisition of a 50% interest in a licensee constitutes a transfer.<sup>4</sup> However, under another Commission case, the acquisition of less than 50% of the licensee's stock is not a transfer.<sup>5</sup> The Commission has also held that a transfer occurs if there is a purchase of 65% of the stock of the controlling company of a licensee.<sup>6</sup>

The Commission has also addressed changes in corporate structures. The Commission has held that a change from a sole proprietorship to a partnership between the initial and amended applications is not a transfer if actual control remains with the entity controlling the

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<sup>4</sup> 31 CIF 37.

<sup>5</sup> 31 CIF 57.

<sup>6</sup> 31 CIF 52.





initial application.<sup>7</sup>

In addition to the *prima facie* instances of a transfer of control outlined in 207 CMR 4.03(1), Commission regulations define additional situations as transfers of control. Regulations found at 207 CMR 4.03(2) state:

- (2) Notwithstanding the *prima facie* instances of transfer of control in 207 CMR 4.03(2), transfer of control of a license shall exist when any or all of the following occur:
  - (a) A licensee relinquishes sole responsibility for the operation and control of the cable system for which a license has been granted;
  - (b) A licensee relinquishes sole responsibility to determine and carry out policy decisions;
  - (c) A licensee relinquishes sole discretion to control employment, supervision and dismissal of personnel;
  - (d) A licensee relinquishes sole responsibility for payment of financial obligations related to the cable system for which a license has been granted.

Under subsection (2), the Commission has held that while proposed management changes may not constitute a transfer, the issuing authority should be notified.<sup>8</sup> However, a change in a management agreement between an investor and the parent company which removes control from the licensee will be a transfer.<sup>9</sup>

As previously mentioned, the Commission's role must be flexible to meet the current trends of the industry. The present regulatory scheme is narrowly defined and restricts the Commission's ability to review and consider the various types of corporate transactions currently being considered in the industry. Enabling the Commission to independently address the issues and individual facts of each circumstance will accelerate the transfer review process and ease the administrative process for all affected parties. Thus, the Commission proposes to repeal 207 CMR 4.03. In the absence of 207 CMR 4.03, the Commission would rely on its precedents and would address and resolve any novel issues that may arise on a case by case basis.

#### **D. 207 CMR 4.04 - Filing Requirements**

Under M.G.L. ch. 166A, § 7, cities and towns have the authority to examine transfers or assignments of ownership. Section 4.04 requires that:


[a]n applicant for transfer of control or assignment of a license . . . file

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<sup>7</sup> 31 CIF 14.

<sup>8</sup> 31 CIF 29.

<sup>9</sup> 31 CIF 58.



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Standard Application Form #100 (207 CMR 7.01), accompanied by the required \$100 application fee. As such application(s) are received they shall be made available for public inspection in the city or town clerk's office during regular business hours and for reproduction at a reasonable fee.

Section 4.04 requires the filing of the Commission standard license application, the Form 100. This form obtains information from a transferee in order to ensure that a city and town can make an informed decision to approve or disapprove a license transfer or assignment.

As a result of the 1992 Cable Act, the FCC adopted Form 394. FCC Form 394 asks questions which are very similar to those in the Form 100. A cable operator proposing to transfer a license is required by federal law to file the FCC Form 394 with the local issuing authority. Thus in Massachusetts, a cable operator must file both the Form 100 and FCC Form 394 with the local issuing authority whenever a license is transferred or assigned.

In an effort to decrease the financial and administrative burdens placed on local government officials as well as on cable operators, the Commission proposes to amend 207 CMR 4.04 as follows:

An applicant for transfer of control or assignment of a license shall file Federal Communications Commission Form 394 (Application For Franchise Authority Consent To Assignment Or Transfer Of Control Of Cable Television Franchise), accompanied by the required \$100 application fee. As such application(s) are received they shall be made available for public inspection in the city or town clerk's office during regular business hours and for reproduction at a reasonable fee.

The Commission proposes that FCC Form 394 be the only form required to be filed with the issuing authority for purposes of a transfer or assignment of an existing license. The Commission submits that this form provides issuing authorities with information surrounding the cable operator's request for consent to the transfer, including corporate and financial information that is similar to the information requested in the Commission's Form 100. Therefore, the proposed amendment should not affect the type of information received in a transfer proceeding but rather should promote administrative efficiency and result in an overall cost savings to local governments since they will have to review only one form, rather than two. Furthermore, this change would not inhibit the issuing authority's review under M.G.L. ch. 166A, § 7. Lastly, and most importantly, the omission of the Form 100 would not, in any way, preclude an issuing authority from requiring further information from a cable operator if, in its opinion, an FCC Form 394 filing is incomplete.

In comparing the two forms, the Commission determined that much of the information requested in the Form 100 is duplicated in FCC Form 394. For example, the Form 100 asks for the following information: identification of the municipality affected by the assignment or transfer, the area to be served, appropriate business contacts and a description of the transferee's





services and business policies. An applicant also needs to list charges for equipment and programming, the number of usable channels, the type of general system design it employs and specific technical features. The transferee must also file a balance sheet, a list of other municipalities where it has a franchise in Massachusetts, its business structure, method of capitalization and indebtedness.

Similar to the Form 100, FCC Form 394 asks for general background information which would also identify the parties and area involved in the transaction. FCC Form 394 also requires: a copy of the contract or agreement pursuant to which the transfer will occur, a narrative explaining any potential plans to change the current terms and conditions of service and operations of the system as a consequence of the transfer and an explanation of the transferee's technical qualifications, experience and expertise regarding cable television systems. Also like the Form 100, a transferee must identify its business structure and any jurisdiction where business operations exist. The transferee must also provide a listing of officers, directors, stockholders beneficially holding more than 5% of the outstanding voting shares, general partners, and limited partners holding a partnership interest of more than 5%. Likewise, the transferee must file the most recent financial statements, financial qualifications and, in addition, must certify that it has sufficient net liquid assets to operate the facilities for three months.

The information requested in FCC Form 394 parallels the information requested in the Form 100. Consequently, the Commission is concerned that the filing and review of multiple forms and voluminous documents protracts and may even disturb what is already a lengthy and intricate process. Consequently, we seek your comments to determine whether or not communities, cable operators and other interested parties agree that FCC Form 394 is a sufficient filing for purposes of a license transfer or assignment.

#### **E. 207 CMR 4.05: Hearing and Notice Requirements**

This section contains notice and public hearing requirements. The Commission proposes to clarify certain parts of this section. First, it proposes to replace the words "reasonable time", which appear in the first sentence, with the words "60 days". This change would clarify a long held position by the Commission that within 60 days, but not sooner than 30 days after a transfer application is filed, the issuing authority should hold a public hearing.<sup>10</sup> Furthermore, this time frame coincides with the FCC's transfer regulations which establish a 120 day time frame for local transfer actions.

Next, the Commission proposes to revise the last paragraph of 207 CMR 4.05. Specifically, this provision requires the issuing authority to "make provision for" either a stenographic or audio recording of the transfer hearing(s). The cost of this record is borne by the applicant for the transfer. This section is unclear as to whether the phrase "make provision

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<sup>10</sup> 31 CIF 13.



for" means the issuing authority may choose the recording methodology or that the issuing authority must make arrangements to accommodate the cable operator's choice of recording methodology. Consequently, the Commission proposes to replace the current regulation with the bracketed changes and to delete the underlined portions of this section:

Within [60 days] a reasonable time after the filing of the application, but no sooner than 30 days, the issuing authority shall hold public hearing(s) to consider the desirability of approving the transfer. The issuing authority shall insure that the transferor and transferee, residents, and other interested parties are afforded full and fair opportunity to be heard. Notice of hearing(s) shall explicitly call attention to the availability of the application for public inspection.

Except as otherwise or additionally required by 207 CMR 4.00, any public hearing held pursuant to 207 CMR 4.00 shall require the publishing of notice for the same, sufficient to identify its time, place and purpose, in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication being not less than 14 days before the day of any such hearing(s), or, if there is no such newspaper in such city or town, then by posting such notices in a conspicuous place in the city or town hall for a period not less than 14 days before the day of such hearing(s).

Within an area served by an operating cable system and having cablecasting facilities, the licensee shall cablecast such notice, or a concise summary or description thereof, over its facilities at least once daily on each of four days, two of which shall be within seven and 14 days preceding the hearing date. Such notice shall be cablecast at times most likely to reach the maximum viewing audience. The log of such cablecasts shall be incorporated in the record of any hearing conducted pursuant to 207 CMR 4.00.

Notice requirements established herein may be supplemented by any other means, including causing such notice, or a concise summary or description thereof, to be broadcast by means of radio or television facilities, at such times, and with such frequency, as the issuing authority deems appropriate to serve the public interest.

The issuing authority [may choose the recording methodology of either] shall make provision for a stenographic or tape record of the hearing(s) conducted pursuant to 207 CMR 4.00. The cost of such record shall be borne by the applicant for transfer.

#### **F. 207 CMR 4.06: Issuing Authority Report**

Section 4.06 requires the filing of an issuing authority report. This section reads in part:

Concurrent with the grant or denial of the application, the issuing authority





shall issue a written public statement explaining the basis for its decision. If approval is granted, the statement shall set forth in detail the specific benefits to the residents of the city or town expected to result from the transfer or assignment.

Pursuant to M.G.L. c. 166A, § 7, the report shall also contain a finding by the issuing authority that the consideration being paid for the transfer of a final license for an unconstructed system does not include a substantial payment for the license. Such finding shall be supported by specific factual data as to the investment actually expended by the transferor, the fair market value of the system and by such other directly pertinent information as the issuing authority shall consider determinative.

In the Commission's experience, interpreting the phrase "specific benefits" has been problematic for communities. Some communities have misinterpreted this language to mean the community must obtain some "additional" benefit in exchange for its consent to a request for transfer. Consequently, it placed an additional and unnecessary burden on the community considering the transfer. Therefore, the Commission is proposing to amend this section to require the issuing authority only to inform the Commission in writing of final action taken on any FCC Form 394 filed with the issuing authority within 10 days of such final action being taken.

### **III. SUMMARY**

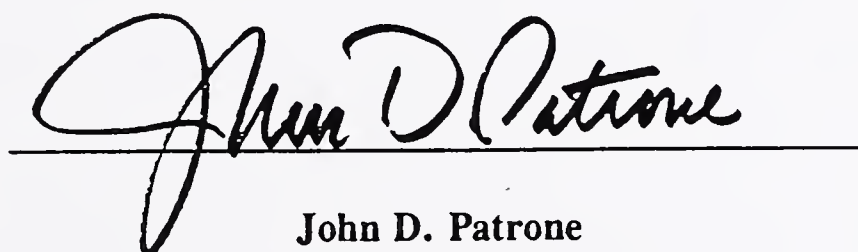
Currently, many cable operators are consolidating their systems, with large cable operators purchasing smaller cable operations. These mergers and acquisitions are due, in large part, to technological advancement and looming changes in the telecommunications industry. The potential landmark telecommunications legislation currently pending before Congress would redefine the playing field for all telecommunications providers. Passage of a new telecommunications bill could expand the competitive marketplace and re-shape the type and number of overall telecommunications service providers.

As a result of the changes and technological advancements in the telecommunications industry, the Commission submits that the current proposal to repeal or amend the transfer requirements is timely. In the long run, these changes should facilitate the advancement of the telecommunications industry in Massachusetts and give the consumers better customer service and more choice among providers.



The Commission is interested in hearing from all interested parties. We would like to know how communities use and review the Form 100. For those communities which recently have acted on transfers and which received both the Form 100 and the FCC Form 394, we would like to know if either was easier to use or provide more helpful information. From cable companies, we would like to hear about the time involved in completing the Form 100 and the FCC Form 394. The Commission's goal is to streamline the transfer process. We seek input from all interested parties to determine how this goal might best be accomplished.

**By Order of the Massachusetts  
Cable Television Commission\***

A handwritten signature in black ink, reading "John D. Patrone", is written over a horizontal line. The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

**John D. Patrone  
Commissioner**

Date: August 16, 1995

\* Formally, the "Massachusetts Community Antenna Television Commission" under M.G.L. ch. 166A, §2.





## 207 CMR 4.00: Transfer Or Assignment Of Control Of A Final License

### Section

- 4.01: Applicability [repealed]
- 4.02: Exclusion [repealed]
- 4.03: Control [repealed]
- 4.04: Filing Requirements [amended]
- 4.05: Hearing and Notice Requirements [amended]
- 4.06: Issuing Authority Report [amended]

#### 4.01: Applicability

[repealed]

#### 4.02: Exclusions

[repealed]

#### 4.03: Control

[repealed]

#### 4.04: Filing Requirements

An applicant for transfer of control or assignment of a license shall file Federal Communications Commission Form 394 ("Application For Franchise Authority Consent To Assignment Or Transfer Of Control Of Cable Television Franchise"), accompanied by the required \$100 application fee. As such application(s) are received they shall be made available for public inspection in the city or town clerk's office during regular business hours and for reproduction at a reasonable fee.

#### 4.05: Hearing and Notice Requirements

Within 60 days after the filing of the application, but no sooner than 30 days, the issuing authority shall hold public hearing(s) to consider the desirability of approving the transfer. The issuing authority shall insure that the transferor and transferee, residents, and



other interested parties are afforded full and fair opportunity to be heard. Notice of hearing(s) shall explicitly call attention to the availability of the application for public inspection.

Except as otherwise or additionally required by 207 CMR 4.00, any public hearing held pursuant to 207 CMR 4.00 shall require the publishing of notice for the same, sufficient to identify its time, place and purpose, in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication being not less than 14 days before the day of any such hearing(s), or, if there is no such newspaper in such city or town, then by posting such notices in a conspicuous place in the city or town hall for a period not less than 14 days before the day of such hearing(s).

Within an area served by an operating cable system and having cablecasting facilities, the licensee shall cablecast such notice, or a concise summary or description thereof, over its facilities at least once daily on each of four days, two of which shall be within seven and 14 days preceding the hearing date. Such notice shall be cablecast at times most likely to reach the maximum viewing audience. The log of such cablecasts shall be incorporated in the record of any hearing conducted pursuant to 207 CMR 4.00.

Notice requirements established herein may be supplemented by any other means, including causing such notice, or a concise summary or description thereof, to be broadcast by means of radio or television facilities, at such times, and with such frequency, as the issuing authority deems appropriate to serve the public interest.

The issuing authority may choose the recording methodology of either a stenographic or tape record of the hearing(s) conducted pursuant to 207 CMR 4.00. The cost of such record shall be borne by the applicant for transfer.

#### 4.06: Issuing Authority Report

Within 10 days of taking final action on any FCC Form 394, the issuing authority shall send the Commission a letter summarizing the action taken.

